

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD L. FERGUSON,

Plaintiff,

v.

COZEN O’CONNOR, P.C., et al.,

Defendants.

CASE NO. C12-1381RAJ

ORDER

I. INTRODUCTION

This matter comes before the court on Defendants’ motion to dismiss and Plaintiff’s motion to remand. The court finds oral argument unnecessary. For the reasons stated herein, the court DENIES the motion to remand (Dkt. # 12) and GRANTS Defendants’ motion to dismiss (Dkt. # 8) in part and DENIES it in part.

II. BACKGROUND

Plaintiff Richard Ferguson is a paralegal at the Seattle office of Cozen O’Connor (“Cozen”), a national law firm. He has worked there since 1999. According to Mr. Ferguson’s complaint, he has been dissatisfied with some aspects of his employment. Among other things, he believes that Cozen underpays its paralegals by not properly crediting them for the hours they work, including overtime hours. Mr. Ferguson repeatedly complained, often in writing, about these practices to various people at Cozen, including the attorneys for whom he worked. He also believes that Cozen and some of its

1 principals have retaliated against him by declining to promote him, denying him salary
2 increases and benefits, and more.

3 According to Mr. Ferguson, one Cozen attorney has done more than merely
4 retaliate against him. Ramona Hunter, according to his complaint, has discriminated
5 against him because of his age. (He is over 50 years old.) He contends that she has
6 waged a campaign of harassment against him, has falsely denigrated his skills at a
7 paralegal to others at the firm, and has falsely told others at the firm that he overstated the
8 hours that he worked.

9 Mr. Ferguson complained to firm management about Ms. Hunter's conduct. Not
10 only did Cozen fail to remedy the situation, the people to whom he complained retaliated
11 against him. They reduced a salary increase, eliminated his salary bonus, and placed
12 negative reviews in his personnel file. Mr. Ferguson believes that they did so in part
13 because he was male.

14 By July 2011, Mr. Ferguson had filed an EEOC complaint asserting gender
15 discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 and
16 age discrimination in violation of the Age Discrimination in Employment Act ("ADEA").

17 After exhausting his EEOC remedies, he sued Cozen and several of its employees
18 in King County Superior Court. Before he served anyone, he amended his complaint.
19 The result is a 36-page, 12-cause-of-action complaint in which his strategy was, as he
20 describes it, to "ple[a]d everything he could think of" Dkt. # 12 at 11. Along with
21 his Title VII and ADEA claims, he asserts claims under the Washington Law Against
22 Discrimination ("WLAD"), a claim for breach of various employment contracts, a claim
23 for violations of unspecified federal and state labor laws that appears to encompass his
24 wage-and-hour complaints, a claim for defamation, one for malicious harassment, two for
25 negligent and intentional infliction of emotional distress, a separate claim for outrage, a
26 claim for negligent supervision, and an omnibus claim for "Fraudulent

1 Inducement/Unfair Competition/Anti-Trust Violations/Abuse of Monopoly Power in
2 Restraint of Trade.” He named Cozen as a Defendant, along with four of its lawyers: Ms.
3 Hunter, Jodi McDougall (the managing partner of Cozen’s Seattle office), Ann Thornton
4 Field (the chair of Cozen’s national commercial litigation department), and Vincent
5 McGuinness (Cozen’s national managing partner). He also sued each attorney’s spouse,
6 apparently for purposes of pursuing each attorney’s community property.

7 Defendants removed the case to this court soon after Mr. Ferguson served them,
8 invoking this court’s subject matter jurisdiction to resolve questions of federal law. Mr.
9 Ferguson asks the court to remand the case; Defendants ask the court, via a motion to
10 dismiss invoking Rule 12(b)(6) of the Federal Rules of Civil Procedure, to substantially
11 pare Mr. Ferguson’s complaint. The court now turns to both motions.

12 III. ANALYSIS

13 A. Motion to Remand

14 The court could not grant Mr. Ferguson’s motion to remand even if it were
15 inclined to do so. He has stated federal claims against the Defendants, and the
16 Defendants have properly removed the action here. *See* 28 U.S.C. § 1441 (defining cases
17 subject to removal); 28 U.S.C. § 1446 (stating removal procedures). In these
18 circumstances, the court has no discretion to remand this action in its entirety. *Williams*
19 *v. Costco Wholesale Corp.*, 471 F.3d 975, 977 (9th Cir. 2006); *Clark v. City of Gig*
20 *Harbor*, No. 09-4099FBB, 2009 U.S. Dist. Ct. LEXIS 38524, *10 (W.D. Wash. Apr. 20,
21 2009) (collecting out-of-circuit authority).

22 The court does have discretion to decline to exercise supplemental jurisdiction
23 over Mr. Ferguson’s state law claims. 28 U.S.C. § 1367(c). If the court were to exercise
24 that discretion, the result would be that Mr. Ferguson’s federal claims would remain in
25 this forum while the state court would resolve his claims arising under Washington law.
26 That result would be in no one’s interest, including Mr. Ferguson’s.

1 Mr. Ferguson's principal reason for requesting remand is that he is proceeding
2 without an attorney and he is more familiar with state court procedures than federal court
3 procedures. Nonetheless, Mr. Ferguson has stated federal claims, and his bare preference
4 for state court is neither a legitimate reason to remand the federal claims nor a legitimate
5 basis to decline supplemental jurisdiction over his state claims. As long as Mr.
6 Ferguson's federal claims remain part of this suit, the court will not decline jurisdiction
7 over his state law claims. Indeed, the court could retain jurisdiction over the state law
8 claims even if his federal claims were to reach a resolution. *See Albingia Versicherungs*
9 *A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 937 (9th Cir. 2003). The court routinely
10 exercises supplemental jurisdiction over Washington law claims intertwined with claims
11 invoking the anti-discrimination provisions of Title VII and other federal statutes. This
12 case presents no circumstances warranting a departure from that practice.

13 **B. Motion to Dismiss**

14 Defendants' attempt to pare back Mr. Ferguson's complaint invokes Federal Rule
15 of Civil Procedure 12(b)(6), which permits a court to dismiss a complaint for "failure to
16 state a claim upon which relief can be granted." In considering whether a complaint
17 states a claim, the court must assume the truth of the complaint's factual allegations and
18 credit all reasonable inferences arising from those allegations. *Sanders v. Brown*, 504
19 F.3d 903, 910 (9th Cir. 2007). The plaintiff must point to factual allegations that "state a
20 claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
21 568 (2007). If the plaintiff succeeds, the complaint avoids dismissal if there is "any set of
22 facts consistent with the allegations in the complaint" that would entitle the plaintiff to
23 relief. *Id.* at 563; *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("When there are well-
24 pleaded factual allegations, a court should assume their veracity and then determine
25 whether they plausibly give rise to an entitlement to relief."). The court typically cannot
26 consider evidence beyond the four corners of the complaint, but it may rely on a

1 document to which the complaint refers if the document is central to the party's claims
2 and its authenticity is not in question. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
3 2006). The court may also consider facts subject to judicial notice. *United States v.*
4 *Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

5 **1. The Court Will Not Further Delay Consideration of the Motion to**
6 **Dismiss.**

7 Before applying these standards to Defendants' motion, the court addresses Mr.
8 Ferguson's requests for additional time to respond to the motion to dismiss. Mr.
9 Ferguson contends that he needs additional time either to prepare a response to the
10 motion to dismiss or to find counsel. The court will not delay consideration of the
11 motion any further.

12 As to Mr. Ferguson's request for additional time to find counsel, the court
13 observes that he filed an EEOC complaint in July 2011 and filed his initial complaint in
14 King County in May 2012. Mr. Ferguson has apparently been unable to find counsel in
15 the more than 18 months since he began contemplating suit. There is no indication that
16 giving him additional time would be of any benefit.

17 As to his request for additional time to respond to the motion to dismiss,
18 Defendants offered him a 30-day extension. He nonetheless timely responded to the
19 motion to dismiss on September 10, although his response consisted of little more than a
20 request for additional delay. More than four weeks later, Mr. Ferguson submitted an
21 amended opposition. Defendants did not object to his untimely submission, although
22 they did request that the court strike a host of arguments Mr. Ferguson made that were
23 not in opposition to the motion to dismiss.¹ In total, Mr. Ferguson had more than six

24 ¹ Mr. Ferguson contends that Cozen has improperly interfered with his ability to prepare a
25 response to the motion to dismiss using Cozen resources, and argues that this is retaliation
26 meriting sanctions and an order requiring Cozen to permit him to use its resources in this
27 litigation. The court suggests no opinion on the merits of these assertions, but agrees that an
28 opposition to a motion to dismiss is no place to bring a motion for sanctions and what amounts to
a motion for a preliminary injunction.

1 weeks from the day the Defendants filed their motion to dismiss to the time he submitted
2 his response. That is more than enough time.

3 Mr. Ferguson also contends that he needs discovery before responding to the
4 motion to dismiss, but he is mistaken. Discovery permits a party to obtain evidence, and
5 evidence is not necessary to oppose a motion to dismiss. An opposition to a motion to
6 dismiss relies solely on the allegations of the complaint.

7 **2. Several of Mr. Ferguson's Claims Name Improper Defendants.**

8 All of Mr. Ferguson's claims name Cozen and at least one individual as
9 Defendants. As to several of those claims, however, Cozen is the only proper Defendant.
10 Title VII and ADEA claims are available only against an employer, not individual agents
11 of the employer. *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993). Mr.
12 Ferguson does not allege that he entered employment contracts with any individual
13 Defendant, yet he names every individual Defendant in his breach of contract cause of
14 action. The court dismisses all of Mr. Ferguson's federal statutory claims and his breach
15 of contract claim to the extent they name any Defendant other than Cozen.

16 As to several claims, Defendants object that Mr. Ferguson improperly named the
17 spouses of the Cozen attorneys, pointing to various reasons that the spouses cannot be
18 liable. It appears that the only reason Mr. Ferguson has named the spouses is to preserve
19 his claims against their marital community. To the extent that he has another basis to
20 hold the spouses liable, his complaint fails to adequately allege it. It is probably
21 unnecessary to continue to maintain this suit against the spouses, and the court expects
22 that the parties should be able to negotiate a resolution that eliminates the need to name
23 them as Defendants. The court declines, however to dismiss the spouses as Defendants
24 except as otherwise stated in this order. Also, although no Defendant raises this issue,
25 the court observes that at least two of the "marital communities" that Mr. Ferguson
26 targets are residents of Pennsylvania, which is not a community property state.

3. Mr. Ferguson Has Not Adequately Alleged Defamation.

The only defamatory statements to which Mr. Ferguson points are statements that Cozen attorneys made within the firm about his job performance. There is no allegation that anyone disseminated those statements outside the firm. False statements, even false statements that damage an employee's reputation, are not defamatory if they are communicated only within the employee's workplace. *Doe v. Gonzaga Univ.*, 24 P.3d 390, 397-98 (Wash. 2001) (discussing intracorporate communications), *rev'd on other grounds, Gonzaga Univ. v. Doe*, 534 U.S. 1103 (2002). Mr. Ferguson's failure to allege dissemination of any potentially defamatory statement outside of Cozen is fatal to his defamation claim.

4. Mr. Ferguson Has Not Adequately Alleged Fraud.

The court agrees with Defendants that Mr. Ferguson's allegations of fraud or fraudulent inducement fail to satisfy the heightened pleading standards of Fed. R. Civ. P. 9(b).

5. This Is Not An Antitrust Case.

Mr. Ferguson's efforts to weave this employment dispute into an antitrust or unfair competition claim are unavailing. His allegations fail to state such a claim.

6. Mr. Ferguson Has Not Adequately Pleaded Malicious Harassment.

Defendants assume (and Mr. Ferguson does not dispute) that his claim for malicious harassment invokes RCW § 9A.36.083, which permits a civil action against someone who has committed the crime described in RCW § 9A.36.080. That crime requires physical injury, damage to property, or threats to inflict such damage. Mr. Ferguson's complaint does not allege that anyone harmed him, his property, or threatened to do so.

1 **7. Outrage and Intentional Infliction of Emotional Distress Are One and**
2 **the Same.**

3 Mr. Ferguson attempts to assert both the tort of outrage and the tort of intentional
4 infliction of emotional distress, not recognizing that he is merely placing different labels
5 on the same tort. *Kloepfel v. Bokor*, 66 P.3d 630, 631 n.1 (Wash. 2003). The court
6 dismisses his outrage claim.

7 **8. The Court Will Not Dismiss Mr. Ferguson's Emotional Distress Claims**
8 **As Duplicative.**

9 Defendants correctly point out that Mr. Ferguson can recover emotional distress
10 damages via his employment discrimination claims and via his claims for intentional and
11 negligent infliction of emotional distress. The time to ensure that he does not recover
12 duplicative damages is at trial or upon entry of judgment. Not only is it unnecessary to
13 dismiss these claims merely because they raise the possibility of duplicative damages, it
14 would be improper to do so. It is possible, based on Mr. Ferguson's allegations, that he
15 can demonstrate the infliction of emotional distress beyond the scope of any of the
16 employment statutes he invokes. Moreover, the court cannot, at this juncture, rule out
17 that Mr. Ferguson can prove both intentional and negligent infliction of emotional
18 distress arising out of different incidents.

19 **9. Some, But Not All, of Mr. Ferguson's Claims Might Be Salvaged With**
20 **an Amended Complaint.**

21 Mr. Ferguson has requested that he be permitted to amend his complaint, although
22 he has not stated what changes he would make to salvage his claims. Nothing prohibits
23 Mr. Ferguson from filing a proper motion to amend his complaint. The court's dismissal
24 of Mr. Ferguson's claims is without prejudice. The only exceptions are his claims
25 invoking federal antidiscrimination statutes against individuals and his duplicative
26 outrage claim. No amendment could make those claims viable.

IV. CONCLUSION

For the reasons previously stated, the court DENIES Mr. Ferguson's motion to remand (Dkt. # 12) and GRANTS Defendants' motion to dismiss (Dkt. # 8) in part and DENIES it in part.

DATED this 22nd day of January, 2013.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Court Judge